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SYKT. E-RETE (M) SDN. BHD.

v.

KESATUAN SEKERJA PEMBUATAN BARANGAN GALIAN BUKAN LOGAM & ANOR.

*b*HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[ORIGINATING MOTION NO. 25-15-90]
8 JUNE 1991

ADMINISTRATIVE LAW: *Certiorari - Industrial Court decision - Error of law on the face of the record - Excess of jurisdiction - Judicial review - Decision making process - Industrial Relations Act 1967, ss. 8, 29, 30, 30(5), 33A.*

c

LABOUR LAW: *Retrenchment - Whether justified - Victimisation - Unfair labour practice - Equity, good conscience and substantial merits - Industrial Relation Act 1967, s. 30(5).*

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The 65 workmen who were members of the 1st respondent, the Non-Metallic Manufacturers Workers Union (NMWU), were retrenched by the applicant on the grounds of redundancy. The Industrial Court (IC), which was the second respondent, had held that this retrenchment was unjustified and inexcusable (the said award) - (see [1990] 1 ILR 106). The applicant then applied for an order of *certiorari* to quash the said award, contending that the IC had acted in error of law on the face of the record and in excess of its jurisdiction and that having been conferred with the powers under ss. 29 and 30 of the Industrial Relations Act 1967, (the Act), had acted erroneously in excess of its jurisdiction by reaching absurd results or reaching results absurdly.

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The applicant complained that:

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- (a) the IC was wrong to rely on the analysis of the accounts by a union representative who was a layman instead of a firm of auditors;
- (b) the retrenchment was justified as the company had been suffering financial losses in 1986 and 1987, these being the years in which the 65 workmen were dismissed;
- (c) there was no evidence to suggest victimisation and there had been no reference to s. 8 of the Act and that therefore the onerous proof had not been discharged by the 1st respondent and
- (d) the IC had made an error in accepting the retrenchment benefits while stating that there had been victimisation.

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Held:

On the facts and circumstances, the IC had acted according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form in line with s. 30 of the Act and had not acted without or in excess for judicial review of the manner in which the IC made its decision.

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[Applicant's motion dismissed.]

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Cases referred to:

Skyt. Kenderaan Melayu Kelantan Sdn. Bhd. v. Transport Workers Union [1990] 1 MLJ 5 (**cons**)
Malayan Banking Bhd. v. Association of Bank Officers, Peninsular Malaysia & Anor. [1988] 1 CLJ (Rep) 183 (**cons**)
Tanjong Jaga Sdn. Bhd. v. Minister of Labour & Manpower & Anor. [1987] CLJ (Rep) 368 (**cons**)

Sabah Banking Employees' Union v. Sabah Commercial Banks Association [1989] 1 CLJ (Rep) 148
(cons)

Legislation referred to:

Rules of the High Court 1980, O. 53 rr. 1A, 1(3)

For the applicant - Bahma Sivasubramaniam, M/s. Ng Yook Woon, Andrew T.C. Saw & Co.

For the first respondent - P. Kuppusamy; M/s. P. Kuppusamy & Co.

JUDGMENT

Abdul Malek Ahmad J:

Leave has been granted by this Court on 7 August 1990 for the applicant to apply for an order of *certiorari* to quash the whole of the decision of the second respondent in Industrial Court Case No. MP4/3-539/88 Award No. 22 of 1990 (hereinafter "the said award") dated 14 February 1990 based on the considerations that the *ex parte* application for leave had been filed on 26 February 1990 within the six-week time limit required under O. 53 r. 1A of the Rules of the High Court 1980 and a copy thereof had been served on the Attorney-General's Chambers as prescribed under O. 53 r. 1(3) of the said rules. The notice of motion in this regard had been filed on 20 August 1990.

The main thrust of learned Counsel for the applicant's arguments was that in the process of reaching its majority decision that the retrenchment of sixty five workmen by the applicant on the ground of redundancy were unjustified and inexcusable, the second respondent had acted in error of law on the face of the record and in excess of its jurisdiction thus rendering the said award amenable to judicial review by this Court and that the second respondent having been conferred with the powers under ss. 29 and 30 of the Industrial Relations Act 1967 (hereinafter "the IRA") to decide only on the basis of equity, good conscience and substantial merits of the whole case had acted erroneously in excess of its jurisdiction by reaching absurd results or reaching results absurdly.

The applicant had four main areas of complaint namely as regards the accounts, retrenchment, victimisation and double recovery. As for the accounts, learned Counsel for the applicant had argued that they had been properly audited by a firm of auditors in compliance with the Companies Act 1965 but the second respondent had chosen to accept the analysis of the union representative, who is a layman, of accounts prepared by professional people.

In relation to retrenchment, learned Counsel for the applicant had submitted that there had been a substantial drop in sales and that when the first respondent complained of the retrenchment exercise on 20 November 1987, fifty five of the sixty five workers had already been retrenched namely twenty on 5 June 1987, seven on 13 July 1987, thirteen on 27 July 1987 and fifteen on 22 August 1987. The remaining ten were retrenched on 21 January 1988.

Concerning victimisation, learned Counsel for the appellant had stated that there was nothing in the exhibits to suggest this and that there had been no reference to s. 8 of the IRA. She maintained that the very onerous proof of this had not been discharged by the first respondent. Finally, as regards double recovery, she said that the second respondent had made an error in accepting the retrenchment benefits while stating that there had been victimisation.

Learned Counsel for the first respondent had replied that there was no evidence that the applicant was suffering financial losses, that the first respondent had filed a complaint as regards the dismissal of its sixty five employee members, that there was no evidence of the

- a** applicant's compelling organisational need to commence the gradual reduction of its workforce for its survival as a manufacturer of construction materials with serious stockpile problems in the construction industry during a severe period of market recession and that it was not true that it was not true that the subsequent recruitment of contract labour of the dismissed employees was entered into some nine months after the last retrenchment in January 1988, which was sixteen months after the first retrenchment on 5 June 1987, in view of the fact
- b** that the said recruitment agreement was dated 4 December 1987.

In the recent case of *Syarikat Kenderaan Melayu Kelantan Sdn. Bhd. v. Transport Workers Union* [1990] 1 MLJ 5, it had been held that:

- c** In spite of the ouster clause in s. 33B(1) of the Act, *certiorari* is still available to quash the decision of the Industrial Court after it is found that the Industrial Court has acted without or in excess of the limit of its jurisdiction; or if the Court has jurisdiction to enter an inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.

In the earlier case of *Malayan Banking Bhd. v. Association of Bank Officers, Peninsular Malaysia & Anor.* [1988] 1 CLJ (Rep) 183, a majority decision of the Supreme Court had ruled that:

- d** [1] Section 33B[1] of the Industrial Relations Act Enacts a private clause precluding *certiorari* in respect of any award, decision or order of the Industrial Court under the Act. A private clause of this nature, however, is not operative in the face of jurisdictional defect or fraud and has no effect at all as regards jurisdictional review.
- [2] For a jurisdictional error, it is not enough to establish error of law. It must be shown that the error goes to jurisdiction, power or validity.

- e** Another majority decision in the Supreme Court in *Tanjong Jaga Sdn. Bhd. v. Minister of Labour & Manpower & Anor.* [1987] CLJ (Rep) 368 had declared that:

- f** Judicial review is of the hearing and not of the decision. It is concerned not with the decision but with the decision-making process and unless that restriction on the power of the Court is observed the Court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

In *Sabah Banking Employees' Union v. Sabah Commerical Banks Association* [1989] 1 CLJ (Rep) 148, the Supreme Court had decided that:

- g** Another ground for *certiorari* is that the decision maker acted in excess of jurisdiction. Such jurisdictional error occurs where a tribunal enters into an inquiry and makes a decision over which it has no authority to do. In this case it is clear from the record and oral argument that the respondent did not complain of any breach of the principles of natural justice.

As regards the dispute retrenchment, the then Federal Court in 1981 had observed that:

- h** In this case the Industrial Court had applied their mind to the proper question for the purpose of making their award; and had not asked themselves the wrong questions or taken into account matters which they should not have taken into account. Accordingly, they had not made an error of law which affected their jurisdiction and therefore their award could not have been quashed by *certiorari* proceedings.

It is necessary to refer to the award itself where the second respondent had identified the issue as being whether the retrenchment of the sixty five employees were due to substantiated losses in 1986 and 1987. In this respect, the second respondent had stated:

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It is a curious paradox that while the company made an operating profit for the years 1983 (RM343,019), 1984 (RM234,236), 1985 (RM259,665) and 1988 (RM103,255), it claims an operating loss for 1986 and 1987, the material years during which period the 65 workmen were dismissed.

It is indeed intriguing for a layman to understand how, despite claiming an operating loss for 1986 and 1987 it paid out the following sums. The 1985 figures are also listed.

	1986	1987	1985
Directors salaries	RM170,000	RM140,200	RM188,500
Bonus & Ang Pow Factory & Administration [Ex: U19]	RM 86,948	RM 43,423	RM110,903
Director's Fees	RM 25,000	RM 15,000	RM 27,500
Dividends payable	RM144,000	RM144,000	RM144,000
Taxation paid	RM135,000	RM 46,304	RM314,338
Entertainment	RM19,784	RM 27,646	RM 23,793

For the sake of emphasis it must be reiterated that the company paid income tax of RM314,338 for 1985, RM135,000 for the year 1986 and RM46,304 for the year 1987. Yet the company pleads it suffered substantial losses in 1986 and 1987. It must also be pointed out that the company had an accumulated tax credit to frank payment of net dividends of RM1,501,000 in 1987 and RM1,859,007 for 1988.

Despite alleged substantial losses in 1986 of RM274,711 the company's accounts show the following figures:

(1) Tax paid	- RM135,000
(2) Depreciation	- RM149,313
(3) Fixed assets purchase	- <u>RM 38,440</u>
	RM332,753
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The union contended and correctly so that the tax paid and depreciation can by no stretch of imagination be described as trading losses. This figure alone comes to RM284,313 and if this sum is deducted from the alleged loss of RM274,711 **it yields a profit of RM9,602**. The union also contends that the sum of RM38,440 utilised for the purchase of fixed assets is not an actual trading loss and ought to be discounted along with the sums paid for taxation and depreciation. This will then yield **a profit of RM48,042 for the year 1986, and not a loss of RM274,711.**

Adopting the case guidelines the union established that the company made a profit of RM225,341 in 1987. The following sums were paid in 1987.

Taxation	RM 46,304
Purchase of fixed assets	RM195,762
Depreciation	RM139,715
Investment in a subsidiary	<u>RM 87,120</u>
	RM468,901
	=====

This figure of RM468,901 minus the alleged loss of RM243,560 for 1987 **yields a profit of RM225,341.**

- a** How can it be pleaded then that the company suffered substantial losses.
- It should also be noted that despite claiming an economic slowdown the company incurred an expenditure of RM35,412 in 1986 and RM50,321 in 1987 for entertainment and travelling, an extravagance the company indulged in while dismissing workmen.
- So much for the accounts.
- b** On the issue of the retrenchment and victimisation, the second respondent had noted that:
- There was neither equity nor good conscience in employing contract labour after dismissing the unionised workmen. In fact contract work was offered and in fact accepted by some of the dismissed workers, purely for their survival.
- In Award No.35/76, the Industrial Court said:
- c** Unless an employer can show that the nature of the work or duties are such as can be performed only by contract labour, the Court will have to conclude that the employment of such labour is merely to circumvent the obligations imposed on the employer by law.
- It will be observed that the first retrenchment took effect on 5 June 1987 (Ex. U17). However, the union called for details of the proposed retrenchment on 19 March 1987. (Ex. U10A)
- d** CW1 admitted in evidence he did not provide such details. This Court therefore rejects the evidence of CW1 that the retrenchment was carried out in consultation with the union. Having dismissed thirty unionised workers he said the company offered to re-employ 25 of them as contract workers. No evidence was called to corroborate the *bona fides* of the offer. The point to note is this. The company was firing unionised workers and attempting to hire them back as contract workers who would not have the full benefits of the collective agreement.
- e** The fifth (5th) collective agreement touched a sensitive nerve of the company and it was doing its utmost to dishonour its obligations under the collective agreement. This can be noted from the evidence of CW1 the personnel manager of the company, which lacked credibility. Further, his evidence was punctuated with uncertainties, forgetfulness and contradictions. He admitted however, in cross-examination of the company's hostility to the new collective agreement.
- f** It is pertinent to note that the company was practising a blatant form of victimisation in dismissing the 65 unionised workmen. No clerks, storekeepers, drivers, supervising staff or kepalas were retrenched. The lowest paid, general and production, unionised workers, was the sole and single target of retrenchment by the company, under the pretext of losses.
- Upon all the evidence and an objective and dispassionate assessment thereof, this Court finds as a fact that the company has failed to discharged its burden of proof upon the pleadings and upon the evidence that it retrenched the 65 employees because it suffered losses in 1986 and 1987.
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- Accordingly, the second respondent had concluded that:
- The dismissal of the sixty five workers in its true perspective and in good conscience was nothing more than pure victimisation and unfair labour practice. The retrenchment was not *bona fide*. The company has failed to establish that the retrenched workers were redundant in the circumstances.
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- Based on these considerations, this Court was of the view that the second respondent had acted according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form in line with s. 30 of the IRA and had not acted without
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or in excess of its jurisdiction necessitating any judicial review of the matter as far as the decision making process of the second respondent is concerned.

In the event, the applicant's motion had been dismissed with costs.

Also found at [1991] 3 CLJ 2952

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